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SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-85875; File No. SR-NYSEAMER-2019-17)

May 16, 2019

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify Rule 961 and Conforming Changes to Rules 933NY and 995NY Governing the Give Up of a Clearing Broker

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on May 2, 2019, NYSE American LLC (“NYSE American” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify Rule 961 regarding the Give Up of a Clearing Member by ATP Holders and proposes conforming changes to Rules 933NY and 995NY. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to modify Rule 961 regarding the Give Up of a Clearing Member⁴ by ATP Holders and to make conforming changes to Rule 933NY.

Rule 961: Current Process to Give Up a Clearing Member

In 2015, the Exchange adopted its current “give up” procedure for ATP Holders executing transactions on the Exchange.⁵ Per Rule 961, an ATP Holder may give up a “Designated Give Up” or its “Guarantor,” as defined in the Rule and described below.

The Rule defines “Designated Give Up” as any Clearing Member that an ATP Holder (other than a Market Maker⁶) identifies to the Exchange, in writing, as a Clearing Member the ATP Holder requests the ability to give up. To designate a “Designated Give Up,” an ATP Holder must submit written notification to the Exchange. Specifically, the Exchange uses a standardized form (“Notification Form”). An ATP Holder may currently designate any Clearing

⁴ Rule 900.2NY(11) defines “Clearing Member” as an Exchange ATP Holder which has been admitted to membership in the Options Clearing Corporation pursuant to the provisions of the Rules of the Options Clearing Corporation.

⁵ See Securities and Exchange Act Release No. 75642 (August 7, 2015), 80 FR 48594 (August 13, 2015) (SR-NYSEMKT-2015-55).

⁶ For purposes of this rule, references to “Market Maker” refer to ATP Holders acting in the capacity of a Market Maker and include all Exchange Market Maker capacities e.g., Lead Market Makers. As explained below, Market Makers give up Guarantors that have executed a Letter of Guarantee on behalf of the Market Maker, pursuant to Rule 932NY; Market Makers need not give up Designated Give Ups.

Member as a Designated Give Up. Additionally, there is no minimum or maximum number of Designated Give Ups that an ATP Holder must identify. Similarly, should an ATP Holder no longer want the ability to give up a particular Designated Give Up, the ATP Holder informs the Exchange in writing.

Rule 961 also requires that the Exchange notify a Clearing Member, in writing and as soon as practicable, of each ATP Holder that has identified it as a Designated Give Up. However, the Exchange will not accept any instructions from a Clearing Member to prohibit an ATP Holder from designating the Clearing Member as a Designated Give Up. Additionally, there is no subjective evaluation of an ATP Holder's list of Designated Give Ups by the Exchange. The Rule does, however, provide that a Designated Give Up may determine to not accept a trade on which its name was given up so long as it believes in good faith that it has a valid reason not to accept the trade.⁷

The Rule defines "Guarantor" as a Clearing Member that has issued a Letter of Guarantee or Letter of Authorization for the executing ATP Holder, pursuant to Rules of the Exchange⁸ that is in effect at the time of the execution of the applicable trade. An executing ATP Holder may give up its Guarantor without such Guarantor being a "Designated Give Up." Additionally, Rule 924NY provides that a Letter of Guarantee is required to be issued and filed by each Clearing Member through which a Market Maker clears transactions. Accordingly, a Market Maker is enabled to give up only a Guarantor that had executed a Letter of Guarantee on its behalf pursuant to Rule 924NY; a Market Maker does not need to identify any Designated Give Ups.

⁷ See Rule 961(f)(1) (setting forth procedures for rejecting a trade). An example of a valid reason to reject a trade may be that the Designated Give Up does not have a customer for that particular trade.

⁸ See Rule 924NY (Letters of Guarantees); Rule 932NY (Letters of Authorization).

Like Designated Give Ups, Guarantors likewise have the ability to reject a trade.⁹

Beginning in early 2018, certain Clearing Members (in conjunction with the Securities Industry and Financial Markets Association (“SIFMA”)) expressed concerns related to the process by which executing brokers on U.S. options exchanges (the “Exchanges”) are allowed to designate or ‘give up’ a clearing firm for purposes of clearing particular transactions. The SIFMA-affiliated Clearing Members have recently identified the current give-up process as a significant source of risk for clearing firms. SIFMA-affiliated Clearing Members subsequently requested that the Exchanges alleviate this risk by amending Exchange rules governing the give up process.¹⁰

Proposed Amendment to Rules 961, 933NY and 995NY

Based on the above, the Exchange proposes to amend its rules regarding the current give up process in order to allow a Clearing Member to opt in, at The Options Clearing Corporation (“OCC”) clearing number level, to a feature that, if enabled by the Clearing Member, would allow the Clearing Member to specify which ATP Holders are authorized to give up that OCC clearing number. As proposed, Rule 961, Give Up of a Clearing Member, will be re-titled as

⁹ See Rule 961(f)(2) (providing that a Guarantor may “change the give up to another Clearing Member that has agreed to be the give up on the subject trade, provided such Clearing Member has notified the Exchange and the executing ATP Holder in writing of its intent to accept the trade”).

¹⁰ Nasdaq PHLX LLC (“Phlx”) recently modified its give up procedure to allow clearing members to “opt in” such that the clearing member may specify which Phlx member organizations are authorized to give up that clearing member. See Phlx Rule 1037. See also Securities and Exchange Act Release Nos. 84624 (November 19, 2018), 83 FR 60547 (Notice); 85136 (February 14, 2019), 84 FR 5526 (February 21, 2019) (SR-Phlx-2018-72) (Approval Order). The Exchange’s proposal leads to the same result of providing its Clearing Members the ability to control risk and includes Phlx’s “opt in” process, but it otherwise differs in process from Phlx’s proposal.

“Authorizing Give Up of a Clearing Member” and would provide that for each transaction in which a non-Market Maker ATP Holder participates, the ATP Holder may indicate any OCC number of a Clearing Member through which a transaction will be cleared (“Give Up”), provided the Clearing Member has not elected to “Opt In,” as defined in paragraph (b) of the proposed Rule, and restricted the OCC number (“Restricted OCC Number”).¹¹ Further, as proposed, an ATP Holder may Give Up a Restricted OCC Number provided the ATP Holder has written authorization as described in paragraph (b)(ii) of the Rule (“Authorized ATP Holder”).¹²

Proposed Rule 961(b) provides that Clearing Members may request that the Exchange restrict one or more of their OCC clearing numbers (“Opt In”) as described in subparagraph (b)(i) of the Rule. As proposed, if a Clearing Member Opt In, the Exchange would require written authorization from the Clearing Member permitting an ATP Holder to Give Up a Clearing Member’s Restricted OCC Number. An Opt In would remain in effect until the Clearing Member terminates the Opt In as described in subparagraph (iii). If a Clearing Member does not Opt In, that Clearing Member’s OCC number may be subject to Give Up by any ATP Holder (other than a Market Maker).¹³

Proposed Rule 961(b)(i) would set forth the process by which a Clearing Member may Opt In. Specifically, a Clearing Member may Opt In by sending a completed “Clearing Member

¹¹ See proposed Rule 961(a).

¹² The Exchange proposes to delete the use of the modifier “executing” as relates to ATP Holder in the rule, which is extraneous and unnecessary, particularly in light of new concept of Authorized ATP Holder. See proposed Rule 961(c)(i), (e)(2), (f)(1)-(3), (g)(1) and (h)(1).

¹³ See proposed Rule 961(b).

Restriction Form” listing all Restricted OCC Numbers.¹⁴ A copy of the proposed form is attached in Exhibit 3A. As proposed, a Clearing Member may elect to restrict one or more OCC clearing numbers that are registered in its name at OCC. The Clearing Member would be required to submit the Clearing Member Restriction Form to the Exchange’s Client Relationship Services (“CRS”) department as described on the form. Once submitted, the Exchange requires ninety days before a Restricted OCC Number is effective. The Exchange believes this 90-day time period would provide adequate time for ATP Holders that use a Restricted OCC Number to obtain the necessary written authorization for that Restricted OCC Number. During this 90-day time period, ATP Holders lacking the requisite authorization (and affected by this proposed provision) would still be able to Give Up that Restricted OCC Number (i.e., until the number becomes restricted within the System).

Proposed 961(b)(ii) would set forth the process for ATP Holders to Give Up a Clearing Member’s Restricted OCC Number. Specifically, as proposed, an ATP Holder desiring to Give Up a Restricted OCC Number must become an Authorized ATP Holder.¹⁵ The Clearing Member would be required to authorize an ATP Holder by submitting a completed “Authorized ATP Holder Form” to the Exchange’s CRS department, unless the Restricted OCC Number is already subject to a Letter of Guarantee or a Letter of Authorization to which the ATP Holder is

¹⁴ The Exchange’s forms will be available on the Exchange’s web site. The Exchange also intends to maintain, on its web site, a list of the Restricted OCC Numbers, which will be updated on a regular basis, and the Clearing Member’s contact information to assist ATP Holders (to the extent they are not already Authorized ATP Holders) with requesting authorization for a Restricted OCC Number. The Exchange may utilize additional means to inform its members of such updates on a periodic basis.

¹⁵ The Exchange will develop procedures for notifying ATP Holders that they are authorized or unauthorized by Clearing Members.

a party, as set forth in proposed paragraph (c) of the Rule. A copy of the proposed form is attached in Exhibit 3B.¹⁶

Pursuant to proposed Rule 961(b)(iii), a Clearing Member may amend its Authorized ATP Holders or Restricted OCC Numbers by submitting a new Authorized ATP Holder Form or a Clearing Member Restriction Form to the Exchange's CRS department indicating the amendment as described on the form. As proposed, once a Restricted OCC Number is effective pursuant to Rule 961(b)(i), the Exchange may permit the Clearing Member to authorize, or remove authorization for, an ATP Holder to Give Up the Restricted OCC Number intra-day only in unusual circumstances, and on the next business day in all regular circumstances. The Exchange will promptly notify the ATP Holders if they are no longer authorized to Give Up a Clearing Member's Restricted OCC Number. Finally, as proposed, if a Clearing Member removes a Restricted OCC Number, any ATP Holder (other than a Market Maker) may Give Up that OCC clearing number once the removal has become effective on or before the next business day.¹⁷

In light of the proposed changes to the Give Up process, the Exchange proposes to delete certain paragraphs of the current Rule related to the current Designated Give Up process. Specifically, the Exchange proposes to delete current paragraphs (a), (b)(1), (3)-(4), (6)-(7), (d).

As proposed, paragraph (c) to Rule 961 would be re-title "Guarantors and Market Makers." Proposed Rule 961(c)(i) would maintain the current definition and role of Guarantor (set forth in current paragraphs (a)(3) and (6)) and combine such information with language from Phlx Rule 1037(d) to provide, in relevant part that "[a] Guarantor for an ATP Holder will

¹⁶ See supra note 14.

¹⁷ See proposed Rule 961(b)(iii).

be enabled to be given up for that ATP Holder without any further action by the ATP Holder such that a clearing arrangement subject to a Letter of Guarantee or Letter of Authorization would immediately permit the Give Up of a Restricted OCC Number by the ATP Holder that is party to the arrangement.”¹⁸ In addition, to streamline the proposed Rule the Exchange proposes to relocate text from current Rule 961(a)(5) regarding Market Makers to proposed Rule 961(c)(ii) without any textual changes.¹⁹ The Exchange also proposes to clarify how the System would handle orders in light of the proposed changes to the Give Up process. As proposed, for any Restricted OCC Number, the Exchange’s trading systems would only accept orders for that number from an Authorized ATP Holder.²⁰

To further update the Rule to reflect the shift from an ATP Holder designating a certain Clearing Member as the give up to the Clearing Member having the ability to limit which ATP Holders may give up that Clearing Member, the Exchange proposes to replace certain references to Designated Give Up with reference to “Clearing Member for whom they are an Authorized ATP Holder”²¹ or affiliated Clearing Member”²² or simply “Clearing Member,”²³ as appropriate.

¹⁸ See proposed Rule 961(c)(i).

¹⁹ See proposed Rule 961(c)(ii). To conform to the foregoing changes to the organization of the Rule, the Exchange proposes to reclassify current paragraph (c) as proposed Rule 961(d).

²⁰ See proposed Rule 961(d).

²¹ See proposed Rule 961(g)(1).

²² See proposed Rule 961(g)(2).

²³ See generally proposed Rule 961(e)-(h). See also proposed Rule 961(d) and (e)(1) (as relates to replacing Designated Give Up with Authorized ATP Holder) and (e)(2), (f)(1)-(3), (g)(1) and (h)(1). The Exchange also proposes to rename Rule 961(e) (from Designated Give Up, to Authorized ATP Holder, as relates to the process for accepting a trade). The Exchange also proposes to update the cross reference in paragraph (e)(1) from “paragraph (i)” to proposed “paragraph (g).” See proposed Rule 961(e)(1).

The Exchange also proposes to add paragraph (i) to the Rule to provide that an “intentional misuse of this Rule is impermissible, and may be treated as a violation of Rule 995NY(b), Prohibited Conduct.” And, consistent with this change, to modify Rule 995NY(b), which was previously held in Reserve, to provide that it would be “considered conduct inconsistent with just and equitable principles of trade for an ATP Holder or associated person of an ATP Holder to intentionally misuse Rule 961, Authorizing Give Up of a Clearing Member.” This language will make clear that the Exchange will regulate an intentional misuse of this Rule and that such behavior would be a violation of Exchange rules.

Finally, consistent with this proposed change, the Exchange also proposes to amend Rule 933NY(f) regarding the responsibilities of Floor Brokers to maintain error accounts “for the purposes of correcting bona fide errors, as provided in Rule 960.” As proposed, the Exchange would specify that “it will not be a violation of this provision if a trade is transferred away from an error account through the CMTA process at OCC.”²⁴ This additional language would enable an executing ATP Holder that has executed an order to CMTA that order through its own clearing relationship. For example, assume a Floor Broker executes a trade giving up Firm A (a Clearing Member that is one of its Authorized ATP Holders) and, after the execution, the Floor Broker is informed that a portion of the trade needs to be changed to give-up Firm B (a Clearing Member that is not one of the Floor Broker’s Authorized ATP Holders). The proposed language would enable the Floor Broker to CMTA the trade to Firm B through its own clearing arrangement (as long as the authorizations are in place for that CMTA to occur) rather than nullifying or busting the trade.

²⁴ See proposed Rule 933NY(f).

Implementation

The Exchange will announce the implementation date of the proposed rule change no later than the end of Q3 2019 via Trader Notice.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b)²⁵ of the Act, in general, and furthers the objectives of Section 6(b)(5),²⁶ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system.

Particularly, as discussed above, several Clearing Firms affiliated with SIFMA have recently expressed concerns relating to the current give up process that permits ATP Holders to identify any Clearing Members as a Designated Give Up for purposes of clearing particular transactions, and have identified the current give-up process (i.e., a process that lacks authorization) as a significant source of risk for clearing firms.

The Exchange believes that the proposed changes to Rule 971 would help alleviate this risk by enabling Clearing Members to ‘Opt In’ to restrict one or more of its OCC clearing numbers (i.e., Restricted OCC Numbers), and to specify which Authorized ATP Holders may Give Up those Restricted OCC Numbers. As described above, all other ATP Holders would be required to receive written authorization from the Clearing Member before they can Give Up that Clearing Member’s Restricted OCC Number. The Exchange believes that this authorization

²⁵ 15 U.S.C. 78f(b).

²⁶ 15 U.S.C. 78f(b)(5).

provides proper safeguards and protections for Clearing Members as it provides controls for Clearing Members to restrict access to their OCC clearing numbers, allowing access only to those Authorized ATP Holders upon their request. The Exchange also believes that its proposed Clearing Member Restriction Form allows the Exchange to receive in a uniform fashion, written and transparent authorization from Clearing Members, which ensures seamless administration of the Rule.

The Exchange believes that the proposed Opt In process strikes the right balance between the various views and interests across the industry. For example, although the proposed rule would require ATP Holders (other than Authorized ATP Holders) to seek authorization from Clearing Members in order to have the ability to give them up, each ATP Holder would still have the ability to Give Up a Restricted OCC Number that is subject to a Letter of Guarantee or Letter of Authorization without obtaining any further authorization if that ATP Holder is party to that arrangement. The Exchange also notes that to the extent the executing ATP Holder has a clearing arrangement with a Clearing Member (i.e., through a Letter of Guarantee or Letter of Authorization), a trade can be assigned to the executing ATP Holder's Guarantor. Accordingly, the Exchange believes that the proposed rule change is reasonable and continues to provide certainty that a Clearing Member would be responsible for a trade, which protects investors and the public interest. Finally, the Exchange believes that adopting paragraph (i) of Rule 961 and paragraph (b) for Rule 995NY would make clear that an intentional misuse of this Rule would be a violation of the Exchange's rules.

The Exchange also believes that the proposed change to Rule 933NY would protect investors because it would permit an executing ATP Holder to utilize its error account to CMTA an order through its own clearing relationship. This would preserve executions while

accommodating the proposed rule change that could result in an executing ATP Holder not being permissioned to for a particular give-up.

Thus, this proposal would foster cooperation and coordination with persons engaged in facilitating transactions in securities, and remove impediments to and perfect the mechanism of a free and open market and a national market system.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that this proposed rule change would impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule change would impose an unnecessary burden on intramarket competition because it would apply equally to all similarly situated ATP Holders. The Exchange also notes that, should the proposed changes make the Exchange more attractive for trading, market participants trading on other exchanges can always elect to become ATP Holders on the Exchange to take advantage of the trading opportunities.

Furthermore, the proposed rule change does not address any competitive issues and ultimately, the target of the Exchange's proposal is to reduce risk for Clearing Members under the current give up model. Clearing firms make financial decisions based on risk and reward, and while it is generally in their beneficial interest to clear transactions for market participants in order to generate profit, it is the Exchange's understanding from SIFMA and clearing firms that the current process can create significant risk when the clearing firm can be given up on any market participant's transaction, even where there is no prior customer relationship or authorization for that designated transaction. In the absence of a mechanism that governs a market participant's use of a Clearing Member's services, the Exchange's proposal may indirectly facilitate the ability of a Clearing Member to manage their existing customer

relationships while continuing to allow market participant choice in broker execution services. While Clearing Members may compete with executing brokers for order flow, the Exchange does not believe this proposal imposes an undue burden on competition. Rather, the Exchange believes that the proposed rule change balances the need for Clearing Members to manage risks and allows them to address outlier behavior from executing brokers while still allowing freedom of choice to select an executing broker.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act²⁷ and Rule 19b-4(f)(6) thereunder.²⁸ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the

²⁷ 15 U.S.C. 78s(b)(3)(A)(iii).

²⁸ 17 CFR 240.19b-4(f)(6).

Commission shall institute proceedings under Section 19(b)(2)(B)²⁹ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEAMER-2019-17 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAMER-2019-17. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for

²⁹ 15 U.S.C. 78s(b)(2)(B).

website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAMER-2019-17 and should be submitted on or before [INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁰

Eduardo A. Aleman
Deputy Secretary

³⁰ 17 CFR 200.30-3(a)(12).

